

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

DEC 5 2003

In re ENRON CORPORATION SECURITIES,)
DERIVATIVE & "ERISA" LITIGATION,)

This Document Relates To:)

MARK NEWBY, *et al.*, individually and on)
behalf of all others similarly situated,)

Plaintiffs,)

vs.)

ENRON CORP., *et al.*)

Defendants.)

MICHAEL N. MILBY, CLERK OF COURT

MDL 1446
and Consolidated, Related
and Coordinated Cases

Civil Action No. H-01-3624
(Consolidated)

**SUPPLEMENTAL SUBMISSION
IN FURTHER SUPPORT OF THE
MOTION TO DISMISS OF DEFENDANTS
LEHMAN BROTHERS HOLDINGS INC.
AND LEHMAN BROTHERS INC.**

Defendants Lehman Brothers Inc. and Lehman Brothers Holdings Inc. (collectively, "Lehman") respectfully submit this supplemental filing in further support of their Motion to Dismiss the Section 10(b)/Rule 10b-5 and Section 20(a) claims (collectively, the "1934 Act claims") against them in the First Amended Consolidated Complaint (the "Amended Complaint"). The purpose of this submission is to bring to the Court's attention the fact that the court-appointed Examiner in the Enron bankruptcy proceedings (the "Examiner") has exonerated Lehman with respect to the very transactions that plaintiffs in this case contend establish Lehman's scienter.

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This previously dismissed plaintiffs' 1934 Act claims against defendant Lehman Brothers Holdings Inc. ("LBHI"), holding that plaintiffs had failed to plead any facts that would give rise to a "strong inference of scienter." *See In re Enron Corp. Sec., Derivative & ERISA Litig.* 235 F.Supp.2d 549, 703 (S.D.Tex 2002). Plaintiffs' allegations, the Court found, "fail[ed] to identify any specific act or material statement or omission or involvement in the alleged Ponzi scheme." *Id.* In an effort to allege such conduct, plaintiffs identified in their Amended Complaint a single set of transactions in which non-defendant Lehman Brothers Finance S.A. and Enron were involved and that, according to plaintiffs, establish Lehman's scienter: the equity forward transactions with Enron. (*See* Lehman's Opening and Reply Memos., at 10-17 and 3-10, respectively.) Plaintiffs' allegations regarding the equity forwards are the only new allegations plaintiffs added to the Amended Complaint to try to enhance their deficient scienter allegations against Lehman. Plaintiffs' threadbare allegations regarding the equity forwards, however, are insufficient to establish a "strong inference of scienter" and Lehman has thus moved to dismiss plaintiffs' amended 1934 Act Claims.

Plaintiffs' theory is that the equity forwards were "disguised loans." (*See* Pl. Opp. Memo., at 61-62.) In opposing Lehman's motion to dismiss, plaintiffs expressly relied on the Examiner's prior reports that made reference to the equity forwards. (*See id.*, at 60, 62.) Plaintiffs argued that "Enron and its independent bankruptcy Examiner have both acknowledged (as plaintiffs claim) that these equity forward contracts were the functional equivalent of debt; and, this debt was never disclosed as such to the investing public pursuant to Enron's 'liberal' interpretation of Generally Accepted Accounting Practices ("GAAP")." (*See id.*, at 60.)¹

¹ Plaintiffs mischaracterized the Examiner's statements about the equity forward. In all reports prior to his final report, the Examiner made only footnote references to the equity forwards with Lehman, eschewed any conclusory comments about or characterizations of the trades and noted that his investigation into the trades was

In his Third Report, the Examiner analyzed and reported on the alleged involvement of certain financial institutions other than Lehman in certain alleged Enron transactions, and noted that he “expects to report on additional financial institutions in his Fourth Interim Report.” (Third Report, at 4 n.9.)² The Examiner has now completed his investigation and has issued his fourth and final report detailing his findings. Eighteen months of investigations have yielded approximately 381 pages of reports, and approximately 2400 pages of exhibits. As part of his investigation, the Examiner examined thousands of Lehman’s documents and deposed Lehman witnesses regarding the equity forwards.

Plaintiffs’ assertion that the Examiner has concluded that the equity forwards were “the functional equivalent of debt” finds no support in the Final Report. Indeed, the Examiner’s Final Report contains *no* reference whatsoever to Lehman or the equity forwards. The only conclusion to draw from this omission is that the Examiner ultimately determined — correctly — that Enron’s equity forwards with Lehman were not “disguised loans,” or improper in any other respect. The Examiner concluded that the equity forwards were unworthy of any mention in his Final Report because the trades played no role in Enron’s alleged scheme to falsify its balance sheet. The Examiner’s Final Report thus confirms the inadequacy of plaintiffs’ attempt to plead 1934 Act claims against Lehman based on the equity forwards. Indeed, the Examiner has not

(continued...)

continuing. (See First Interim Report of Neal Batson, Court-Appointed Examiner, dated September 21, 2002, at 8, n.28; see also Second Interim Report of Neal Batson, Court-Appointed Examiner, dated January 21, 2003 (the “Second Report”), at 11, n.33 (defining equity forwards generally); Third Interim Report of Neal Batson, Court-Appointed Examiner, dated June 30, 2003 (the “Third Report”), at 10, n.22 (correcting definition of equity forwards provided in the Second Report, and noting that equity forward contract is properly defined as “a contract to exchange an equity or equity basket at a set price at a future date.”).) As noted *infra*, the Examiner omitted any mention of the equity forwards in his fourth and final report (the “Final Report”).

² Lehman was investigated by the court-appointed examiner for Enron Corporation, Neal Batson. The bankruptcy court also appointed a separate examiner, Harrison J. Goldin, in connection with Enron North America’s bankruptcy. Goldin investigated additional financial institutions, and issued his report on November 14, 2003. Goldin did not investigate or report on Lehman.

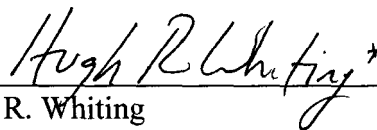
recommended that Enron pursue any claims against Lehman with respect to the equity forwards or any other matter.

CONCLUSION

For all of the foregoing reasons, and for the reasons stated in Lehman's opening and reply briefs, plaintiffs' 1934 Act claims against Lehman should be dismissed with prejudice.

Dated: December 5, 2003
Houston, Texas

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record for all parties to the above cause through esl3624.com in accordance with the Court's order regarding website service on the 5th day of December, 2003.

